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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HERACLIO SANCHEZ RODRIGUEZ,

Defendant and Appellant.

B266674

(Los Angeles County
Super. Ct. No. KA037343)

APPEAL from an order of the Superior Court of
Los Angeles County, William C. Ryan, Judge. Affirmed.

Suzan E. Hier, under appointment by the Court of Appeal,
for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler,
Chief Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Noah P. Hill and Rene Judkiewicz,
Deputy Attorneys General, for Plaintiff and Respondent.

This appeal requires us to determine what evidence a trial court may consider in finding a defendant ineligible for resentencing under the Three Strikes Reform Act of 2012 (Proposition 36 or the Act). In 1998, a jury found appellant Heraclio Sanchez Rodriguez guilty of possession of a firearm by a felon in violation of former Penal Code section 12021, subdivision (a)(1).¹ The trial court sentenced him to 25 years to life in prison under the Three Strikes law. On July 24, 2013, appellant filed a petition for recall of sentence pursuant to section 1170.126. The trial court denied with prejudice the petition, finding appellant ineligible for relief because he was armed with a firearm during the commission of the offense. This appeal followed. We affirm.

FACTUAL SUMMARY

The information filed November 4, 1997, charged appellant with eight felony offenses. Count 1 alleged assault with a firearm on or about August 9, 1997, in violation of section 245, subdivision (a)(2). Counts 2 and 3 each alleged assault with a deadly weapon on or about August 9, 1997, in violation of section 245, subdivision (a)(1). Count 4 alleged possession of a firearm by a felon on or about August 9, 1997, in violation of former section 12021, subdivision (a)(1). Counts 5 and 6 alleged assault with a firearm on or about August 10, 1997, in violation of section 245, subdivision (a)(2).

¹ Unless otherwise stated, all further section references are to the Penal Code.

Count 7 alleged possession of a firearm by a felon on or about August 10, 1997, and count 8 alleged possession of a firearm by a felon on or about August 21, 1997, both in violation of former section 12021, subdivision (a)(1). The information also alleged several prior serious and violent felony convictions. Appellant elected to go to jury trial.

On January 27, 1998, the jury found appellant not guilty of counts 1, 2 and 4; guilty as to count 3 of the lesser included offense of assault, and guilty of count 8, possession of a firearm by a felon. The jury hung on counts 5, 6, and 7. At sentencing, the trial court struck some, but not all, of the alleged prior convictions. The court sentenced appellant to six months in the county jail on count 3 and sentenced him to prison for 25 years to life on count 8. Upon the People's motion, the trial court dismissed the remaining counts. Relevant to this appeal is the conviction on count 8, possession of a firearm by a felon on August 21, 1997.

The facts presented to the jury as to count 8 were simple. On August 21, 1997, police executed a search warrant at appellant's house. Appellant was in the house when the police arrived; he was the first person escorted out before the police began the search. Also at the house were a man, and a woman with an infant. Another man was sleeping in a trailer in the backyard. During the search police found a gun in the drawer of a desk located in a home office in the garage. When asked by police prior to the search if there were guns at the residence, appellant said that there was a gun, but he did not know where it was located.

On July 24, 2013, appellant filed a petition for recall of sentence under Proposition 36. On July 29, 2013, the trial court issued an order to show cause. The People filed their opposition to the petition on September 16, 2013, and a supplemental opposition and supplemental brief on May 20, 2015. On June 15, 2015, appellant filed a bifurcated reply. Attached to appellant's bifurcated reply were the information (Exhibit A); the jury forms (Exhibit B); the Amended Abstract of Judgment (Exhibit C); and the unpublished appellate opinion of *People v. Heraclio S. Rodriguez* (May 5, 1999, B121876), affirming his conviction and sentence (Exhibit D).

The trial court set an eligibility hearing on the petition for August 17, 2015. On August 10, 2015, the People filed their exhibits for the hearing. The exhibits included the Abstract of Judgment (Exhibit 1); the same unpublished court of appeal opinion (Exhibit 2); a synopsis of the trial witnesses' testimony from the trial transcript (Exhibit 3); and the Reporter's Transcript of the trial testimony of Pomona Police Officers Edil Vazquez and Raul Camargo.

On August 17, 2015, the trial court held an eligibility hearing. The trial court admitted into evidence without objection the parties' exhibits and pleadings. No live testimony was proffered. The trial court denied the petition. First, it made the following finding: "I understand the facts are that the police delivered a search warrant at his house. After they had gotten Mr. Rodriguez out of the house and during their search, they found a .22 Beretta handgun in a desk door [*sic*] in a converted garage that was used as an office in Mr. Rodriguez' house, and they also found photos of the defendant with other guns." The court assumed the garage was detached. Correcting the court,

defense counsel advised that the garage was connected to the house.

The trial court then ruled: “On the basis of the submissions and arguments of counsel, the court finds the petition [*sic*] statutorily ineligible for recall and resentencing pursuant to Penal Code section 1170.126, because during the commission of the crime of being a felon in possession, he was armed with a firearm. Accordingly, the petition is denied with prejudice pursuant to [sections 667, subdivision (e)(2)(C)(iii) and 1170.126, subdivision (e)(2)].” The trial court later issued a written order to the same effect.

ISSUE

The issue that disqualified appellant from resentencing is the trial court’s finding he was armed with a firearm during the commission of the offense. Appellant argues that instead of determining the “nature” of appellant’s actual conviction, the trial court improperly reviewed the trial record looking for evidence of arming and made its own factual finding that appellant was armed during the commission of the offense. According to appellant, the trial court’s finding was erroneously based on an expansive reading of the record of conviction which should have been limited to the facts of the offense for which he was actually convicted. We disagree and affirm the trial court order denying with prejudice appellant’s petition.

DISCUSSION

On November 6, 2012, the electorate passed the Three Strikes Reform Act of 2012, also known as Proposition 36. Proposition 36 has prospective and retrospective components. (*People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1292.) The prospective provisions of Proposition 36 changed the requirements for sentencing a third strike offender under the Three Strikes law. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167 (*Yearwood*).) Under the original version of the law, a defendant who had two or more prior serious or violent felony convictions was subject to a sentence of 25 years to life upon any new felony conviction. (Former §§ 667, subd. (b)-(i), 1170.12.) Proposition 36 amended sections 667 and 1170.12 to require a life sentence only where the new felony is a serious or violent offense, unless the prosecution pleads and proves certain disqualifying factors. In all other cases, the defendant will be sentenced as a second strike offender. (*Yearwood*, at pp. 167-168.)

The Act also created a retrospective, postconviction release proceeding whereby an inmate serving an indeterminate life sentence for a felony that is not serious or violent and who is not otherwise disqualified, may have the sentence recalled. The inmate can then be resentenced as a second strike offender unless the court determines resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).)

Central to this appeal is the issue of disqualification: even if the third strike is not a serious or violent felony, an inmate is nonetheless ineligible for resentencing if he or she has one of the enumerated disqualifying factors found in section 1170.126. One such factor is whether “[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

The factual determination of whether the circumstances of the offense of conviction disqualify a defendant from resentencing is analogous to the factual determination of whether a prior conviction is a serious or violent felony under the Three Strikes law. Such factual determinations about prior convictions are made by the court based on the entire record of conviction. (*People v. Guerrero* (1988) 44 Cal.3d 343, 355 (*Guerrero*); *People v. Hicks* (2014) 231 Cal.App.4th 275, 286; *People v. Arevalo* (2016) 244 Cal.App.4th 836, 848 (*Arevalo*).) The entire record of conviction includes the appellate opinion (*People v. Woodell* (1998) 17 Cal.4th 448, 456); transcripts of testimony (*People v. Bartow* (1996) 46 Cal.App.4th 1573); admissions (*People v. Goodner* (1990) 226 Cal.App.3d 609); and preliminary hearing transcripts (*People v. Blackburn* (1999) 72 Cal.App.4th 1520). It also includes facts established within the record, such as a defendant’s personal admissions on *Tahl*² waiver forms, even if those facts are not essential to the judgment. (*People v. Smith* (1988) 206 Cal.App.3d 340, 344-345 (*Smith*).)

² *In re Tahl* (1969) 1 Cal.3d 122.

Guerrero is the seminal case which established that the trial court may look at the “record of conviction,” not just the judgment of conviction, to determine the factual circumstances of an offense. In that case, the trial court reviewed the accusatory pleadings and the defendant’s pleas in order to determine the nature of the conduct underlying the convictions. Our Supreme Court validated that methodology, but warned: “To allow the trier of fact to look to the entire record of the conviction is certainly reasonable; it promotes the efficient administration of justice and, specifically, furthers the evident intent of the people in establishing an enhancement for ‘burglary of a residence’—a term that refers to *conduct*, not a specific *crime*. To allow the trier to look to the record of conviction—*but no further*—is also fair: it effectively bars the prosecution from relitigating the circumstances of a crime committed years ago and thereby threatening the defendant with harm akin to double jeopardy and denial of speedy trial.” (*Guerrero, supra*, 44 Cal.3d at p. 355.)

Smith, which followed *Guerrero*, is instructive. Smith was found guilty of three counts of burglary. He had prior convictions for second degree burglary, which the trial court found to be prior convictions for “burglary of a residence,” thus using them as a basis to enhance defendant’s sentence. The evidence proving the priors included defendant’s guilty pleas to second degree burglary and his signatures on *Tahl* waiver forms where he admitted to entering residences with intent to commit theft. Defendant later argued his admissions to burglarizing residences could not be used to enhance his sentence because entering a residence was not an element of the offense of which he was found guilty, i.e.,

second degree burglary. (*Smith, supra*, 206 Cal.App.3d at p. 343.)

Relying on *Guerrero*, the *Smith* court noted a distinction between enhancements that refer to conduct and enhancements that refer to specific crimes. (*Smith, supra*, 206 Cal.App.3d at p. 344.) Where the enhancement refers to prior conduct, the court may examine reports that establish facts describing the conduct, even though the conduct itself is not essential to the underlying prior offense. (*Ibid.*) With “no difficulty” (*id.* at p. 345), the *Smith* court concluded that charging documents, *Tahl* forms, and sentencing transcripts are included in “any definition of ‘record of conviction.’” (*Ibid.*, fn. omitted.)

Next, *People v. Trujillo* (2006) 40 Cal.4th 165 (*Trujillo*) presented the “relitigation” problem that the *Guerrero* court warned about. In that case, defendant agreed to enter a guilty plea in exchange for the prosecution’s agreement to drop an allegation of personal use of a dangerous weapon. After the guilty plea, the probation officer reported that defendant had stated, “‘I stuck [the victim] with the knife.’” (*Trujillo*, at p. 171.) Years later the prosecutor wanted to use defendant’s statement to prove that the prior conviction was for a serious felony. (*Id.* at pp. 169-170.)

The *Trujillo* court would not allow it. Although the statement appeared in the probation report, the stabbing was never actually at issue or litigated in connection with the original conviction and sentence because the subject had been dropped by agreement of the parties. No findings were made; no facts were established. Therefore, the defendant’s statement in the probation report did not describe the nature of the crime of which he was convicted and could not be used to prove that the prior

conviction was for a serious felony. Relitigation of the nature of the offense at a later date implicated *Trujillo*'s double jeopardy concerns. (*Trujillo, supra*, 40 Cal.4th at pp. 179-180.)

Here appellant argues the jury never found, as part of its verdict, that he was armed during the commission of the offense. The sentencing court never made such a finding either. Appellant reasons that because it was not litigated to the jury or the court, the trial court could not find "arming" as part of the conduct underlying the conviction. According to appellant, to make such a finding now would be to "relitigate" the offense in violation of *Guerrero* and *Trujillo*.

Appellant puts too fine a point on *Guerrero* and *Trujillo*. Both stand for the proposition that facts never established in the original record of conviction cannot be "proven" or relitigated in later, unrelated proceedings. Neither case limits the record of conviction to only those facts required to establish the elements of an offense. If additional facts are established by competent evidence, as *Smith* holds they may be, such facts may be used in later proceedings.

Here, in concluding that appellant was armed with a firearm during the commission of the offense, the trial court relied on the exhibits submitted by the parties, including the trial testimony of the two officers who executed the search warrant and found the firearm at appellant's house. This testimony alone provides a sufficient evidentiary basis to support the conclusion that appellant was armed with a firearm during the commission of the offense. Vazquez testified that he went to appellant's house on August 21, 1997, to serve a search warrant. To ensure officer safety, he spoke to appellant by telephone before executing the warrant to ask him if he had a gun in the house. Appellant

told Vazquez there was a gun in the house, but he did not know where it was in the house. When the officers arrived, they asked appellant to leave the house. Appellant complied; he was the first person to exit the house.

The trial testimony of Camargo was also received into evidence without objection. Camargo testified that he went to appellant's home on August 21, 1997, to execute a search warrant. He found a .22-caliber Beretta semiautomatic pistol inside a drawer of a desk in a converted garage home office. The home office was connected to the house. Appellant had already exited the residence by the time Camargo found the gun.

It is the firearm found in the drawer which was the evidentiary basis for appellant's conviction on count 8, possession of a firearm by a felon. In denying the petition for recall of sentence, the trial court properly relied on facts established at trial at the time of the original conviction, that is, that the police found a firearm in a desk drawer in a home office in appellant's house after they had removed appellant from the house. No new or different evidence was received into evidence when the trial court made its ruling. No one disputed these facts. In short, if, as appellant asserts, "[l]itigation is a contest as to [the] facts," no litigation occurred.

Instead, the trial court took the facts established at trial and arrived at the legal conclusion that defendant was armed with a firearm during the commission of the offense. The phrase "armed with a firearm" in section 667, subdivision (e)(2)(C)(iii) means "having a firearm available for use, either offensively or defensively." (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 (*Osuna*); *People v. White* (2014) 223 Cal.App.4th 512, 524 (*White*) [it is the availability—the ready access—of the weapon that

constitutes arming].) Thus, a defendant convicted of violating former section 12021, subdivision (a)(1), can also be deemed “armed” during the commission of the offense if the firearm he or she was convicted of possessing was available for use, either offensively or defensively. (*Osuna*, at p. 1035.)

Moreover, there must be a “temporal nexus” between the possession of the firearm and the arming—meaning the firearm must be available for use either offensively or defensively during the time it is possessed. A “facilitative nexus” (*People v. Brimmer* (2014) 230 Cal.App.4th 782, 794-799)—that the firearm be available for use to further commission of the offense—is not required. (*Id.* at pp. 794-799; *White, supra*, 223 Cal.App.4th at pp. 524-526.)

Here, the trial testimony of Vazquez and Camargo establishes that the firearm was in a desk drawer in a converted garage office at appellant’s home and appellant was in the home before he was asked to exit the house. This is not a situation where, for example, a convicted felon kept a firearm in a locked offsite storage unit where he had no ready access to it. (*White, supra*, 223 Cal.App.4th at p. 524.) The trial court’s legal conclusion that appellant had ready access to the weapon for offensive or defensive purposes is supported by the officers’ undisputed testimony. That the trial court may have also reviewed a photo of a defendant holding a firearm is of no moment.

Finally, in *Arevalo, supra*, 244 Cal.App.4th at p. 852, we held a trial court must find disqualifying factors using the standard of proof of beyond a reasonable doubt. Assuming without deciding that the trial court used a preponderance-of-the-evidence standard in denying the petition, we nonetheless affirm.

We conclude based on the facts established at trial that there was overwhelming evidence that appellant was “armed with a firearm” within the meaning of section 667, subdivision (e)(2)(C)(iii). Any error by the trial court in using the preponderance-of-the-evidence standard was harmless beyond a reasonable doubt. (Cf. *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Rubio* (2004) 121 Cal.App.4th 927, 934 [most constitutional errors are subject to harmless error analysis because they do not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence].)³

³ We decline the People’s invitation to overrule *Arevalo*. We also decline appellant’s invitation to overrule those cases holding that a “facilitative nexus” is not required to find a defendant “armed with a firearm” “[d]uring the commission of the current offense” within the meaning of sections 667, subdivision (e)(2)(C)(iii) and 1170.12, subdivision (c)(2)(C)(iii).

DISPOSITION

The order denying with prejudice the petition for recall of sentence is affirmed.

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STRATTON, J.*

We concur:

EDMON, P. J.

ALDRICH, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.